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10  
11 UNITED STATES DISTRICT COURT  
12 NORTHERN DISTRICT OF CALIFORNIA  
13 SAN JOSE DIVISION  
14

15 WINDSOR AUCTIONS, INC., a Florida  
corporation, and JEWELRY AUCTIONS  
16 CORPORATION, a New Jersey corporation,

17 Plaintiffs,

18 v.

19 EBAY, INC., a Delaware corporation,

20 Defendant.  
21  
22  
23  
24  
25  
26  
27  
28

Case No. C 07 06454 RMW

**NOTICE OF MOTION AND MOTION TO  
DISMISS COMPLAINT PURSUANT TO FED.  
R. CIV. PROC. 12(B)(6); MEMORANDUM  
OF POINTS AND AUTHORITIES IN  
SUPPORT**

**DEMAND FOR JURY TRIAL**

Date: March 28, 2008  
Time: 9:00 a.m.  
Judge: Ronald M. Whyte  
Trial Date: Not yet set

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**NOTICE OF MOTION AND MOTION TO DISMISS**

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD IN THIS MATTER:

PLEASE TAKE NOTICE that on Friday, March 28, 2008 at 9:00 a.m., or as soon thereafter as this motion may be heard, Defendant eBay Inc. will move to dismiss each of Plaintiffs' four claims set forth in the Complaint. This motion is made under Federal Rule of Civil Procedure 12(b)(6). eBay moves to dismiss with prejudice counts one through four on the following grounds: (1) as a matter of law, the Robinson-Patman Act, 15 U.S.C. § 13 *et seq.*, is inapplicable to services provided by eBay to Plaintiffs; (2) as a matter of law, Plaintiffs' allegations do not support a claim under California's Unfair Practices Act, Cal. Bus. & Prof. Code § 17045; and (3) Plaintiffs' allegations are insufficient to support their claims for common law unfair competition and breach of implied covenant of good faith and fair dealing. This motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, Request for Judicial Notice, Declaration of Adam Sand ("Sand Decl."), the pleadings on file, oral argument of counsel, and such other materials and argument as may be presented in connection with the hearing on the motion.

**STATEMENT OF ISSUES TO BE DECIDED**

1. Whether the Robinson-Patman Act, 15 U.S.C. § 13 *et seq.*, applies to services provided by eBay.
2. Whether Plaintiffs' allegations support a claim under California's Unfair Practices Act, Cal. Bus. & Prof. Code § 17045.
3. Whether Plaintiffs have alleged facts sufficient to support a claim for common law unfair competition.
4. Whether Plaintiffs have alleged facts sufficient to support a contractual claim for breach of implied covenant of good faith and fair dealing.

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

Plaintiffs are related business entities that operate an auction house to sell jewelry in live auctions that are accessible to online bidders via eBay's Live Auction website. Auction houses

1 who want to use eBay's Live Auction website to make their live auctions accessible to online  
2 bidders have two options for interfacing with eBay's Live Auction site: they can do business  
3 directly with eBay or they can access eBay's Live Auction platform via a third-party intermediary  
4 such as Live Auctioneers LLC. Plaintiffs opted to access eBay's Live Auction platform via a  
5 third-party intermediary, even though they could always access eBay's Live Auction platform  
6 directly. Instead, they now complain that auction houses doing direct business with eBay have  
7 access to better services.

8 Specifically, Plaintiffs complain that direct live auction clients like their competitor  
9 George Molayem have access to an "auction time-duration tool" which, when manipulated,  
10 permits them to prominently display their sales items in eBay's item listings. Apparently, Live  
11 Auctioneers does not provide its clients with a similar tool or function.

12 Rather than demanding improved services from Live Auctioneers, or, alternatively,  
13 cutting out the middle man altogether and joining Molayem's ranks to interface directly with  
14 eBay, Plaintiffs filed this action against eBay, asserting *price discrimination* claims under the  
15 Robinson-Patman Act, despite a total absence of any allegation that eBay has charged  
16 discriminatory prices, and despite the fact that the Robinson-Patman Act is applicable only to  
17 sales of commodities, not services like those rendered by eBay. Plaintiffs also assert various  
18 California state law claims, none of which is sufficiently supported by Plaintiffs' factual  
19 allegations. The Court should reject Plaintiffs' attempt to hold eBay responsible for the services,  
20 practices and policies of the third-party intermediary with whom Plaintiffs elected to do business.  
21 Plaintiffs' Complaint should be dismissed in its entirety because it fails to state a claim for relief  
22 under any cognizable legal theory.

## 23 II. STATEMENT OF FACTS

24 As described in Plaintiffs' Complaint, eBay owns and operates the largest online  
25 marketplace in the world at its website located at www.ebay.com. Compl. ¶ 7. eBay facilitates  
26 direct sales transaction between users, and also facilitates live auctions through its website located  
27 at www.ebayliveauctions.com. *Id.* Auction houses who wish to sell their wares via eBay's Live  
28 Auctions platform can either do business directly with eBay or they can connect with eBay

1 through Live Auctioneers LLC, a third-party intermediary which offers a technological platform  
2 through which remote auction transactions can be made on eBay's website. *Id.* ¶¶ 8, 12.

3 Plaintiffs are auction houses in the business of selling jewelry. *Id.* ¶ 10. Plaintiffs opted  
4 to partake of eBay's Live Auctions platform via Live Auctioneers LLC; accordingly, in 2005,  
5 Windsor Auctions<sup>1</sup> entered into agreements with both Live Auctioneers and eBay and  
6 commenced selling jewelry on eBay's Live Auctions platform through Live Auctioneers. *Id.*  
7 ¶¶ 8, 10.

8 In 2007, Plaintiffs learned that a competitor, George Molayem, whose auction houses do  
9 direct business with eBay rather than connecting via third-party intermediary Live Auctioneers,  
10 was using an "auction time-duration tool"<sup>2</sup> in a manner than allowed his items to be consistently  
11 placed at the front of sales listings on eBay's website. *Id.* ¶¶ 12, 13. Plaintiffs allege that this  
12 "auction time-duration tool" was not available to them or other sellers connecting via third-party  
13 intermediary Live Auctioneers. *Id.* ¶¶ 12-5. However, Plaintiffs omit that they could access  
14 eBay's Live Auction platform directly, just like their competitor Molayem and all other auction  
15 houses registered to sell items via eBay's Live Auction platform.

### 16 **III. LEGAL STANDARDS ON RULE 12(B)(6) MOTION TO DISMISS**

17 This Court may dismiss a claim when "there is no cognizable legal theory or an absence  
18 of sufficient facts alleged to support a cognizable legal theory." *Navarro v. Block*, 250 F.3d 729,  
19 732 (9th Cir. 2001). In deciding a motion under Rule 12(b)(6), "all material allegations of the  
20 complaint are accepted as true, as well as all reasonable inferences to be drawn from them." *Id.*  
21 However, as the Supreme Court recently emphasized, "labels and conclusions, and a formulaic  
22 recitation of the elements of a cause of action will not" survive a motion to dismiss. *Bell Atl.*

23  
24 <sup>1</sup> It is not clear from the Complaint how the two plaintiff businesses are related; however,  
25 Plaintiffs clearly concede that only Windsor Auctions entered into contractual agreements with  
26 Live Auctioneers and eBay. Compl. ¶¶ 1, 2, 10.

27 <sup>2</sup> Plaintiffs refer to this tool as the "Batch Uploading Tool." Compl. ¶ 13. To the best of eBay's  
28 knowledge, this so-called "tool" is simply a timing function present in eBay's Live Auction  
platform and is accessible to all entities interfacing with eBay's Live Auction platform, including  
Plaintiffs.

1 *Corp. v. Twombly*, 127 S.Ct. 1955, 1965 (2007). *Accord Nat'l Ass'n for Advancement of*  
 2 *Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043, 1049 (9th Cir. 2000) ("Conclusory  
 3 allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for  
 4 failure to state a claim."). A claim should be dismissed if a statutory cause of action does not  
 5 apply to the defendant's conduct as a matter of law. *See, e.g., Parks Sch. of Business, Inc. v.*  
 6 *Symington*, 51 F.3d 1480, 1485-86 (9th Cir. 1995) (dismissal of plaintiff's statutory claim  
 7 warranted where plaintiff's allegations are insufficient to bring defendant within the parameters  
 8 of that statute).

#### 9 IV. ARGUMENT

##### 10 A. As a matter of law, the Robinson-Patman Act, 15 U.S.C. § 13 *et seq.*, does not 11 apply to eBay's services.

12 The Robinson-Patman Act, in relevant part<sup>3</sup>, provides:

13 It shall be unlawful for any person engaged in commerce ... to  
 14 discriminate in price between different purchasers of commodities  
 15 of like grade and quality, where either or any of the purchases  
 16 involved in such discrimination are in commerce, where such  
 commodities are sold for use, consumption, or resale within the  
 United States ... and where the effect of such discrimination may  
 be substantially to lessen competition ....

17 15 U.S.C. § 13(a). In order to state a prima facie case for a violation of the Robinson-Patman  
 18 Act, Plaintiffs must allege (1) two or more contemporaneous sales by the same seller; (2) at  
 19 different prices; (3) of commodities of like grade and quality; (4) where at least one of the sales  
 20 was made in interstate commerce; and finally, (6) that the "effect of such discrimination may be  
 21 substantially to lessen competition." *Id. See Rutledge v. Electric Hose & Rubber Co.*, 511 F.2d  
 22 668, 677 (9th Cir. 1975). Plaintiffs have not pleaded facts to support any of the first three

---

23 <sup>3</sup> There are several other subsections under which buyers and sellers of commodities can assert  
 24 violations of the Robinson-Patman Act, *see* 15 U.S.C. § 12 subs. (c), (d), (e), and (f); however, it  
 25 is clear that none of these subsections apply to eBay's conduct as alleged in Plaintiffs' Complaint.  
 26 For example, subsection (e)'s prohibitions cannot apply to Plaintiffs' allegations because they  
 27 "apply only to services or facilities connected with the resale of the product by the purchaser."  
 28 *Purdy Mobile Homes, Inc. v. Champion Home Builders Co.*, 594 F.2d 1313, 1317 (9th Cir. 1979).  
 Similarly, subsection (d) cannot apply because that subsection "refers to payments in connection  
 with the resale by the buyer of the goods, for advertising, promotion or other similar purposes."  
*Rutledge v. Electric Hose & Rubber Co.*, 511 F.2d 668, 678 (9th Cir. 1975).



1 requirements; nor can Plaintiffs amend their Complaint to state facts sufficient to support these  
2 requirements.

3 **1. Plaintiffs' allegations do not involve the same seller.**

4 To state a claim for relief under the Robinson-Patman Act, a plaintiff must allege, at the  
5 very minimum, "[t]wo or more contemporaneous sales *by the same seller*." *Rutledge*, 511 F.2d at  
6 677 (emphasis added). Plaintiffs allege that eBay offered the "auction time-duration tool" to  
7 auction houses doing business directly with eBay but that such tool was not available to auction  
8 houses doing business indirectly through third-party intermediary Live Auctioneers. Compl.  
9 ¶¶ 10, 12-14. Such allegations fail to state a claim under the Robinson-Patman Act because the  
10 offending transactions do not stem *from the same seller*.<sup>4</sup> Under Plaintiffs' allegations, the  
11 differing services were provided by two different service providers – eBay and Live Auctioneers.  
12 To impose liability on eBay under these facts would be to hold eBay liable for the services,  
13 practices and policies of an independent business entity, Live Auctioneers.

14 **2. Plaintiffs' allegations do not assert price discrimination in the sale of**  
15 **commodities.**

16 The Robinson-Patman Act prohibits price discrimination in the sales of commodities.  
17 15 U.S.C. § 13(a). *See Volvo Trucks North Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164,  
18 176 (2006) (Robinson-Patman Act proscribes price discrimination only to the extent that it  
19 threatens to injure competition). But Plaintiffs' Complaint alleges that eBay discriminated  
20 against auction houses by providing differing services.

21 Although the Act does not define the terms "commodity" or "service", "[l]egislative  
22 history reveals ... that Congress intended the Act to apply to tangible goods and not services."

23 <sup>4</sup> Any attempt by Plaintiffs to amend their allegations to meet this requirement would necessarily  
24 fail. Since Plaintiffs did not receive services directly from eBay, the only allegation they could  
25 assert against eBay to meet this requirement would be that eBay failed to make the "auction time-  
26 duration tool" available to direct service purchasers like Molayem as well as Live Auctioneers.  
27 Even if this were true (which it is not, as eBay is informed and believes that such tool was in fact  
28 available to Live Auctioneers), such an allegation still fails to support a Robinson-Patman Act  
claim because Molayem and Live Auctioneers are not *competitors*. Rather, Live Auctioneers is  
simply a third-party intermediary that provides technology services to Molayem's competitors.  
Compl. ¶¶ 8, 10.

1 *May Dep't Store v. Graphic Process Co.*, 637 F.2d 1211, 1214 (9th Cir. 1980). Other courts'  
2 holdings support this finding. In particular, courts have determined that:

- 3 • Newspaper advertising is not a commodity within this section; thus advertising practices  
4 of newspaper with respect to placement of advertisements did not violate the Robinson-  
5 Patman Act. *Nat'l Tire Wholesale, Inc. v. Washington Post Co.*, 441 F. Supp. 81  
(D.C.D.C. 1977).
- 6 • Nor is provision of cellular telephone service system the sale of a commodity for purposes  
7 of the Robinson-Patman Act. *Metro Commc'ns Co v. Ameritech Mobile Commc'ns, Inc.*,  
8 984 F.2d 739 (6th Cir. 1993).
- 9 • Nor is printing of comic books a sale of a commodity for purposes of the Robinson-  
10 Patman Act. *First Comics, Inc. v. World Color Press, Inc.*, 884 F.2d 1033 (7th Cir. 1989),  
11 *cert. denied*, 493 U.S. 1075 (1990).

12 Plaintiffs already admit that eBay is a service provider and is not in the business of selling  
13 commodities. *See* Compl. ¶ 7 (alleging that eBay “promotes the goods and services of others”  
14 and “facilitates” direct and live auction sales transactions); *id.* ¶ 17 (alleging that eBay “host[s]”  
15 Live Auctions). Similarly, Plaintiffs admit that Windsor Auctions merely contracted with eBay  
16 for the provision of services. *See* Compl. ¶ 10. The contract between eBay and Windsor  
17 Auctions clearly explains that eBay is simply a service provider and is not directly involved in the  
18 sales transactions between the auction house and the buyer. *See* Sand Decl. ¶ 2 (Agreement<sup>5</sup> at  
19 Exh. B, ¶ 1.1 (“eBay is not a certified Auction House and therefore does not conduct the Live  
20 Auctions. The Live Auction allows Company to list items in Live Auctions run by certified  
21 auctioneers. eBay is solely a passive conduit to facilitate communication between Company and  
22 Buyers.”)). Thus, on its face, the Robinson-Patman Act does not and cannot apply to the Live  
23 Auction service transaction described in Plaintiffs’ Complaint.

24 \_\_\_\_\_  
25 <sup>5</sup> As fully explained in eBay’s request for judicial notice filed contemporaneously herewith, the  
26 terms of the agreement between eBay and Windsor Auctions, to which the Live Auction  
27 Agreement is attached and incorporated, are appropriate for consideration on motion to dismiss  
28 because the agreement is referenced in Plaintiffs’ Complaint. Compl. ¶¶ 10, 31 & 35. Because of  
the confidential nature of the parties’ agreement, a true and correct copy of the agreement will be  
lodged with the Court under seal pending the Court’s granting of the Administrative Motion to  
File Under Seal pursuant to Civ. L.R. 79-5 filed herewith.

1                   **3. Even if Plaintiffs had stated a prima facie case under the Robinson-**  
 2                   **Patman Act, such a claim would necessarily fall to the “availability**  
 3                   **exception” defense.**

4           Plaintiffs’ Robinson-Patman claim also fails because the allegations necessarily succumb  
 5           to the “availability exception,” an affirmative defense to the application of the Robinson-Patman  
 6           Act. Under this defense, if a lower price is made available to an allegedly disfavored buyer, but  
 7           the buyer does not take advantage of the offer, the resulting price difference is not actionable  
 8           under subsection (a) of the Robinson-Patman Act. *See Klamath-Lake Pharms. Ass’n v. Klamath*  
 9           *Med. Serv. Bureau*, 701 F.2d 1276, 1283 (9th Cir. 1983), *cert. denied*, 464 U.S. 822. In that case,  
 10          plaintiff purchasers sued defendant seller for price discrimination. The only evidence of  
 11          discrimination was a ten percent volume discount rate. *Id.* The court held that this did not  
 12          constitute price discrimination because “[t]he discount was available to any buyer with purchases  
 13          over \$300.” *Id.* Plaintiffs claimed they never received the offer, but the court found that  
 14          contention alone was “not enough” evidence of unavailability. *Id.*

15          Here, even assuming that Plaintiffs’ allegations of price discrimination were true, the  
 16          claim fails because Plaintiffs have not alleged (and cannot) that they were prohibited from  
 17          becoming direct Live Auction customers of eBay (rather than doing business through the third-  
 18          party intermediary Live Auctioneers). On the contrary, under the facts as alleged in the  
 19          Complaint, one can only infer that Plaintiffs were free to interface directly with eBay, just like  
 20          their competitor George Molayem.<sup>6</sup> Compl. ¶¶ 10, 12. Because the Complaint acknowledges  
 21          that the “auction time-duration tool” at issue was available to direct customers of eBay, even if it  
 22          was not available to auction houses doing business through a third-party intermediary, any claim  
 23          for violation of the Robinson-Patman Act necessarily succumbs to the “availability exception”  
 24          defense. Thus, Plaintiffs’ first claim for relief for violation of the Robinson-Patman Act should  
 25          be dismissed with prejudice.

26  
 27  
 28          <sup>6</sup> Indeed, the agreement between eBay and Windsor Auctions expressly states that it is non-  
 exclusive. *See* Sand Decl. ¶ 5.

1           **B. As a matter of law, California’s Unfair Practices Act, Cal. Bus. & Prof. Code**  
 2           **§ 17045, does not apply to Plaintiffs’ allegations.**

3                   **1. Plaintiffs do not allege that eBay extended special services or privileges**  
 4                   **to purchasers purchasing upon like terms and conditions.**

5           California’s Unfair Practices Act provides, in relevant part:

6                   The secret<sup>7</sup> payment or allowance of rebates, refunds, commissions,  
 7                   or unearned discounts, whether in the form of money or otherwise,  
 8                   or secretly extending to certain purchasers *special services or*  
 9                   *privileges not extended to all purchasers purchasing upon like*  
 10                   *terms and conditions*, to the injury of a competitor and where such  
 11                   payment or allowance tends to destroy competition, is unlawful.

12           Cal. Bus. & Profs. Code § 17045 (emphasis added).

13           In Section 17045 claims involving the extension of special services or privileges to certain  
 14           purchasers, a plaintiff must allege and prove that the purchasers were purchasing on “like terms  
 15           and conditions.” *Eddins v. Redstone*, 134 Cal. App. 4th 290, 332-33 (2006). But, per the  
 16           Plaintiffs’ allegations, the auction houses receiving different services are clearly purchasing on  
 17           *different* terms and conditions. Direct eBay clients, like Molayem, are purchasing under one set  
 18           of terms and conditions, while indirect eBay clients, like Plaintiffs, who interface with eBay  
 19           indirectly via a third-party intermediary, are purchasing under a different set of terms and  
 20           conditions. Furthermore, Plaintiffs purchased services from Live Auctioneers, a third-party  
 21           intermediary completely independent from eBay, while Molayem purchased services directly  
 22           from eBay. Compl. ¶ 8, 10, 12. To hold eBay liable under Section 17045 under Plaintiffs’  
 23           alleged facts would be to hold eBay responsible for the services, practices and policies of an  
 24           independent third-party with whom Plaintiffs elected to do business. As a matter of law,  
 25           Plaintiffs’ allegations do not support a claim for a violation of Section 17045; consequently,  
 26           Plaintiffs’ second claim for relief should be dismissed.

27           <sup>7</sup> Secrecy is another required element of a Section 17045 claim. Plaintiffs conclusorily allege that  
 28           eBay “initially secretly allowed Mr. Molayem to use the Batch Uploading Tool, and now openly  
 condones such use.” Compl. ¶ 15. But Plaintiffs plead no facts to support the conclusion that  
 eBay “secretly allowed” the use of the auction time-duration tool, and eBay disputes this  
 conclusion. In fact, as noted in footnote 2, *supra*, to the best of eBay’s knowledge, the auction  
 time-duration “tool” is simply a timing function of eBay’s Live Auction platform.

1                   **2. Even if Plaintiffs stated a prima facie case for a violation of Section**  
 2                   **17045, such a claim would necessarily fall to the “functional**  
 3                   **classification” defense.**

4                   The “functional classification” defense entitles the seller to use different prices when  
 5                   selling to buyers in different classifications because a buyer “in the favored classification  
 6                   performs some function, and assumes the risks and costs of that function, that would otherwise be  
 7                   incurred by the seller.” *Eddins*, 134 Cal. App. 4th at 337. For example, a special distributor who  
 8                   purchased records and placed them in self-service racks at retail outlets was permitted to be  
 9                   “given the standard 38 percent dealer discount, [offered to all record retailers], plus an additional  
 10                  10 percent off the remaining cost because of his extra expenses in supplying and servicing the  
 11                  racks.” *Harris v. Capitol Records Distributing Corp.*, 64 Cal. 2d 454, 457 (1966). The court  
 12                  reasoned that, based on the purchasers’ different functional classifications, defendant did not  
 13                  discriminate between them. *Id.* at 463.

14                 Likewise, eBay is entitled to offer differing services to auction houses who do business  
 15                 with eBay directly, rather than those who interface with eBay indirectly via a third-party  
 16                 intermediary. Direct auction houses “assume[] the risks and costs of [doing direct business with  
 17                 eBay] that would otherwise be incurred by [eBay or third-party intermediary Live Auctioneers]”  
 18                 and thus are entitled to receive special services as a matter of California law. *Eddins*, 134 Cal.  
 19                 App. 4th at 337.

20                 **C. Plaintiffs’ allegations do not support a claim for common law unfair**  
 21                 **competition.**

22                   **1. Plaintiffs’ allegations do not support the typical common law unfair**  
 23                   **competition scenario of misappropriation of a competitor’s goods.**

24                 It is impossible to tell from the vague allegations of the Complaint under which branch of  
 25                 unfair competition law Plaintiffs hope to state a claim. Plaintiffs’ allegations are obviously  
 26                 outside the typical scope of California’s common law of unfair competition, which encompasses  
 27                 claims relating to misappropriation of a competitor’s goods. *Southland Sod Farms v. Stover Seed*  
 28                 *Co.*, 108 F.3d 1134, 1147 (9th Cir. 1997) (quoting *Bank of the West v. Sup. Ct.*, 2 Cal. 4th 1254,

1 1263 (1992)) (“The common law tort of unfair competition is generally thought to be  
2 synonymous with the act of ‘passing off’ one’s goods as those of another....”).<sup>8</sup>

3 **2. Plaintiffs’ allegations do not support claims for breach of confidential**  
4 **relationship or fiduciary duty, nor trade secret protection.**

5 Even interpreting the common law of unfair competition more broadly than the Ninth  
6 Circuit or the California Supreme Court have done, Plaintiffs have failed to plead with  
7 particularity any potentially applicable common law unfair competition claim. According to one  
8 California appellate court, unfair competition claims can include contractual non-compete  
9 provisions, as well as the following torts: breach of confidential relationship, breach of fiduciary  
10 duty, interference with prospective economic advantage, interference with contractual relations,  
11 trade secret protection, and misappropriation. *Balboa Ins. Co. v. Trans. Global Equities*, 218 Cal.  
12 App. 3d 1327, 1341-42 (1990).<sup>9</sup> Assuming for the sake of argument that “unfair competition”  
13 should be read so broadly as to include all of these claims, eBay is forced to guess which  
14 branches of unfair competition apply to the Complaint. Clearly, Plaintiffs’ allegations do not  
15 encompass the enforcement of a contractual non-compete provision; nor do Plaintiffs’ allegations  
16 support claims for breach of confidential relationship or fiduciary duty, nor trade secret  
17 protection.

18  
19  
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22  
23 <sup>8</sup> To state a claim for the typical unfair competition misappropriation claim, the following  
24 elements must be alleged: (1) the plaintiff invested substantial time, skill or money in developing  
25 its property; (2) the defendant appropriated and used the property at little or no cost; (3) the  
26 plaintiff did not authorize or consent to the property’s appropriation and use; and (4) the plaintiff  
was injured by the appropriation and use. *City Solutions Inc. v. Clear Channel Commc’ns, Inc.*,  
365 F.3d 835, 842 (9th Cir. 2004). Plaintiffs have made no such allegations.

27 <sup>9</sup> It appears from this analysis that the *Balboa* court construes “unfair competition” much more  
28 broadly than the traditional common law context to include an array of common law and statutory  
claims.

1                   **3. Plaintiffs' allegations do not support claims for interference with**  
 2                   **prospective economic advantage.**

3           The two branches possibly applicable to the facts of this case are intentional and negligent  
 4 interference with prospective economic advantage.<sup>10</sup> But Plaintiffs' allegations fail to support  
 5 such claims.

6           To state a claim for intentional interference with economic advantage, Plaintiff must  
 7 allege: "(1) an existing economic relationship or one 'containing the probability of future  
 8 economic benefit'; (2) knowledge by the defendant of that relationship; (3) acts by defendant  
 9 designed to disrupt the relationship; (4) actual disruption of the relationship; (5) damages  
 10 proximately caused by the acts of the defendant." *Accuimage Diagnostics Corp. v. Terarecon,*  
 11 *Inc.*, 260 F. Supp. 2d 941, 956 (N.D. Cal. 2003)(quoting *Della Penna v. Toyota Motor Sales,*  
 12 *U.S.A.*, 11 Cal. 4th 376, 380 n.1 (1995)). "Significantly, the act must be 'wrongful by some legal  
 13 measure other than the fact of interference itself.'" *Id.* (citing *Della Penna*, 11 Cal. 4th at 393).

14           Plaintiffs fail to plead facts supporting all of these elements. First, Plaintiffs fail to plead  
 15 an existing economic relationship. Even construing the Complaint to allege a loss of potential  
 16 customers, such allegation would not suffice because "an existing relationship is required." *Id.* at  
 17 957 (citing *Roth v. Rhodes*, 25 Cal. App. 4th 530, 546 (1994)). Furthermore, Plaintiffs have not  
 18 alleged that eBay has committed an act that is wrongful by some legal measure other than the fact  
 19 of interference itself.

20           Nor have Plaintiffs successfully stated a claim of negligent interference with prospective  
 21 economic advantage. The tort of negligent interference with prospective economic advantage is  
 22 established where a plaintiff demonstrates: (1) an economic relationship between plaintiff and  
 23 some third party with a probability of future economic benefit to plaintiff; (2) defendant's  
 24 knowledge of that relationship; (3) defendant engaged in wrongful conduct; (4) it was reasonably

25 \_\_\_\_\_  
 26 <sup>10</sup> eBay addresses these possible claims in an abundance of caution, despite the fact that most  
 27 cases treat them as separate from any claims of common law unfair competition. *See, e.g.,*  
 28 *Southland Sod Farms*, 108 F.3d at 1147; *Allen v. Ghouliah Gallery*, No. 06cv371, 2007 WL  
 4207923, at \*11-12 (S.D. Cal. Nov. 20, 2007); and *Silicon Knights, Inc. v. Crystal Dynamics,*  
*Inc.*, 983 F. Supp. 1303, 1310-13, 1315-16 (N.D. Cal. 1997).



foreseeable that the wrongful conduct would interfere with the economic relationship if defendant failed to exercise due care; (5) defendant was negligent; (6) the economic relationship was actually interfered with; and (7) plaintiff lost in whole or in part the economic benefit from the economic relationship. 5 Witkin, Summary 10th (2005) Torts, § 753, p. 1090; BAJI §§ 7.82.1, 7.86.1. In addition, the court must first determine as a matter of law whether defendant owed plaintiff a duty of care. 5 Witkin, Summary 10th (2005) Torts, § 751, p. 1086.

Just like the intentional interference claim, this claim fails because, if anything, the Complaint merely contains speculative allegations of economic relationships. Further, this claim fails because Plaintiffs have failed to allege any duty of care on the part of eBay, and, as discussed in Section IV.D, below, any such duty would be extra-contractual and thus inconsistent with the terms of the agreement between eBay and Windsor Auctions.

Plaintiffs' allegations clearly do not support the misappropriation claim typically associated with the common law of unfair competition. Even if the Court construes the common law of unfair competition extremely broadly to encompass intentional or negligent interference with prospective economic advantage, Plaintiffs' allegations fail to support such claims. Consequently, Plaintiffs' third claim for violations of California's common law of unfair competition should be dismissed.<sup>11</sup>

**D. Plaintiffs have not stated a valid claim for breach of implied covenant of good faith and fair dealing.<sup>12</sup>**

Under California law, every contract contains an implied covenant of good faith and fair dealing which requires that neither party do anything that will deprive the other of the benefits of the contract. *See Kransco v. Am. Empire Surplus Lines Ins. Co.*, 23 Cal. 4th 390, 400 (2000). However, a covenant of good faith and fair dealing may be implied *only to protect the express terms of the contract*. "The covenant of good faith is read into contracts in order to protect the

<sup>11</sup> At a minimum, this claim should be dismissed with leave to amend so that eBay may clearly and fully understand the claims asserted against it.

<sup>12</sup> By Plaintiffs' own admission, this cause of action can only be asserted by Windsor Auctions against eBay; it cannot be asserted by Jewelry Auctions Corporation because they are not alleged to be a party to the contract. *See* Compl. ¶¶ 10, 31.



1 express covenants or promises of the contract, not to protect some general public policy interest  
 2 not directly tied to the contract's purposes." *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 690  
 3 (1988). "[T]he implied covenant protects only the parties' right to receive the benefit of their  
 4 agreement." *Id.*, at 699 n.39. *Accord Carma Developers (Cal.), Inc. v. Marathon Dev. Cal., Inc.*,  
 5 2 Cal. 4th 342, 373 (1992) ("It is universally recognized the scope of conduct prohibited by the  
 6 covenant of good faith is circumscribed by the purposes and express terms of the contract").  
 7 "[I]mplied terms should never be read to vary express terms." *Carma Developers*, 2 Cal. 4th at  
 8 374.

9 Plaintiffs contend that Windsor Auctions entered into a written agreement with eBay,  
 10 pursuant to which Windsor Auctions would sell jewelry via eBay's Live Auctions platform.  
 11 Compl. ¶ 31.<sup>13</sup> Plaintiffs further allege that, under this agreement, eBay agreed to provide a  
 12 venue for Windsor Auctions to conduct online auctions, and Windsor Auctions agreed to pay  
 13 eBay certain fees for using that venue to sell items at auction. *Id.* Plaintiffs have not alleged that  
 14 eBay failed to perform under the contract by failing to provide the promised venue. Instead, the  
 15 only allegation of breach is that "eBay has engaged in unfair dealing in connection with the  
 16 agreement, by providing the Batch Uploading Tool to Mr. Molayem but not to Plaintiffs." *Id.*  
 17 ¶ 33.<sup>14</sup>

18 Plaintiffs have not alleged—and cannot—that the relevant contract required eBay to  
 19 provide an "auction time-duration tool" or to disclose competitors' use of such a tool should such  
 20

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21 <sup>13</sup> Plaintiffs neglected to attach what they contend is the relevant agreement between Windsor and  
 22 eBay "because it contains a confidentiality provision." Compl. ¶ 35. Because an assessment of  
 23 Plaintiffs' allegation of breach requires perusal of the terms of this confidential agreement, and  
 24 because, as explained in eBay's request for judicial notice filed contemporaneously herewith, the  
 terms of the agreement are appropriate for consideration on motion to dismiss, a true and correct  
 copy of the agreement will be lodged with the Court pending the Court's granting of the  
 Administrative Motion to File Under Seal pursuant to Civ. L.R. 79-5 filed herewith.

25 <sup>14</sup> eBay is puzzled by Plaintiffs' allegation that they were not "provided" with the "tool" because,  
 26 in pre-litigation correspondence between the parties, Plaintiffs acknowledged that the so-called  
 27 tool was always available through eBay and by extension thereof, to Live Auctioneers, LLC and  
 28 Plaintiffs. Further, Plaintiffs admitted that the so-called tool is not a "magic bullet" employed by  
 [competing] vendors," but rather, it is only "creative use" of the timing function available to all  
 eBay Live Auction sellers.

1 tool be available to some auction houses (such as those interfacing directly with eBay). In fact,  
 2 such an allegation would be inconsistent with the terms of the agreement between Windsor and  
 3 eBay. The agreement contains an “entire agreement” provision, which forecloses Plaintiff from  
 4 alleging such an extra-contractual duty. *See* Sand Decl. ¶ 2 (Agreement at ¶ 19(g)). The express  
 5 terms of the agreement only require eBay to provide Windsor Auctions access to its venue for  
 6 conducting online auctions.<sup>15</sup> *See id.* (Agreement at ¶ 2). Plaintiffs have alleged no facts to  
 7 support the conclusion that eBay has failed to fulfill this contractual covenant. Because “[t]he  
 8 implied covenant protects only the parties’ right to receive the benefit of their agreement,”  
 9 *Foley*, 47 Cal. 3d at 699 n.39, and because Plaintiffs have not alleged, and cannot, that eBay has  
 10 not fulfilled its contractual duty to provide its Live Auction venue to Windsor Auctions,  
 11 Plaintiffs’ breach of implied covenant claim should be dismissed.

12 **E. Leave to Amend Should Be Denied Since Amendment Would Be Futile.**

13 Plaintiffs should not be given leave to amend the first, second, or fourth claims for relief  
 14 asserted in the Complaint. Amendment should not be granted when doing so would be futile.  
 15 *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Miller v. Yokohama Tire Corp.*, 358 F.3d 616, 622  
 16 (9th Cir. 2004). As demonstrated above, Plaintiffs cannot state a claim for relief under the  
 17 Robinson-Patman Act because (1) eBay is a service provider, not a seller of commodities, (2) the  
 18 current dispute concerns only disparate services, not discriminatory pricing, and (3) Plaintiffs’  
 19 allegations concede that the disparate services were provided by different service providers (*i.e.*,  
 20 eBay versus third-party intermediary Live Auctioneers). Likewise, Plaintiffs cannot state a claim  
 21 for relief under Section 17045 of California’s Unfair Practices Act because Plaintiffs’ allegations  
 22 concede that the disparate services were provided by different service providers (*i.e.*, eBay versus  
 23 third-party intermediary Live Auctioneers). Finally, Plaintiffs cannot state a claim for breach of  
 24 implied covenant because the agreement between the parties simply cannot support an implied  
 25 covenant on eBay’s part to not offer disparate services to direct versus indirect clients, or to  
 26

27 <sup>15</sup> The contract also contains a “no warranty” provision which explains that eBay does not warrant  
 28 that its services will meet Windsor Auction’s requirements or that the operation of eBay’s  
 services will be error free. Sand Decl. ¶ 2 (Agreement at ¶ 13).

1 impose a duty on eBay to disclose competitors' manipulations of offered services. Such  
2 covenants are inconsistent with the express terms of the agreement and thus forbidden. For these  
3 reasons, Plaintiffs should not be granted leave to amend their first, second, or fourth claims for  
4 relief.

5 Moreover, Plaintiffs have not stated a valid claim for violation of California's common  
6 law of unfair competition, and under the facts alleged, it appears impossible for them to do so. At  
7 the very minimum, Plaintiffs should be required to re-plead this claim to provide eBay sufficient  
8 notice of what claim they are truly asserting.

9 **V. CONCLUSION**

10 For all of these reasons, Defendant eBay Inc. respectfully requests that this Court dismiss  
11 Plaintiff's first through fourth causes of action.

12 **REQUEST FOR JURY TRIAL**

13 Pursuant to Fed. R. Civ. P. 38(b) and Civil L.R. 3-6, eBay hereby requests a jury trial as to  
14 all the issues to which it is so entitled.

15 Dated: February 12, 2008

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